numbers of people necessary to satisfy equipopulosity." J.S. App. at 125. The court noted that "[a] map drawer must travel east almost 800 miles to reach another county that approaches, much less exceeds, 100,000 souls: Webb County, at the western edge of the southern tip of Texas." *Id.*

Correlated to District 23's immense size is tremendous economic and demographic diversity, even within traditional racial and ethnic communities. A survey of some of the District's discrete communities only begins to hint at its overall diversity. The population center of the District, for example, is suburban San Antonio, with nearly one-third of the District's population.[3] A visitor to this part of the District will see an affluent and growing population that is about 30% Latino—a suburban community not unlike ones that can be found in almost any metropolitan area in the United States.[4]

"Hard by the Mexican border is a different kind of place": Laredo.[5] Located 150 miles south of San Antonio, Laredo is an urban commercial center with an economy tied to the importation and exportation of $160 billion worth of goods annually. With 12,000 railcars and 9,000 trucks traversing the city's three cross-border bridges every day, the inland port city is the main freight crossing point on the border.[6] The city's residential areas are divided between lower-income neighborhoods in South Laredo and higher-income neighborhoods in North Laredo.

Two-hundred miles east of El Paso is Reeves County. With a Latino population of around 75%, the county is anchored around Pecos, its largest community. It is an

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[3] Barone at 1646.

[4] Latino population data in this section is based on the 2000 census as set forth in the Texas Legislative Council's report, *Population Analysis with County Subtotals: Congressional Districts – Plan 01374C* (Oct. 9, 2003), *available at* http://www.tlc.state.tx.us/redist/pdf/c1374/red100.pdf (last visited Jan. 31, 2006).

[5] Barone at 1659.

[6] Barone at 1645, 1659.

economically depressed area, with a shrinking population, where the county detention center is one of a very small number of significant employers.

Del Rio is the primary population center in Val Verde County, located near the center of the District's Mexican border. While it is overwhelmingly Latino—with an 81% Latino population—Del Rio is politically conservative. The town's chief economic engine is Laughlin Air Force Base rather than cross-border trade, but both military and border issues are important to many Del Rio voters.

North of Del Rio, in the heart of ranching country, is sparsely populated Edwards County, with a 45% Latino population. Fewer than 1,000 voters in this county cast ballots in the 2004 presidential election.[7] Wool and mohair are the chief local products, but the end of subsidies under the 1954 National Wool Act has hurt the ranching industry and the overall economy.

Finally, south of Val Verde County is Eagle Pass in Maverick County. Although most border communities are centered around cities located in the United States, a Mexican city—Piedras Negras across the river—exerts strong influence on Eagle Pass. In recent years, trade has fueled Eagle Pass's substantial economic growth, helping the city overcome high unemployment and other problems. Also located in Maverick County is a federal Indian tribe, the Kickapoo, which runs a casino on its reservation. The county is 95% Latino.

These examples paint the true portrait of District 23: an economically, demographically, and geographically diverse district that defies simple descriptions. It includes Latino professionals in the suburbs of San Antonio, customs brokers in downtown Laredo, ranchers far west of the Texas foothills, and unemployed workers in some of the nation's poorest counties. The District's geography ranges from

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[7] Office of the Secretary of State, 1992 – 2006 Election History, *at* http://elections.sos.state.tx.us/elchrist.exe (last visited Jan. 28, 2006) ("Election History").

urban streets to rolling foothills to barren ranchland. The economic bases include oil and gas, ranching and farming, border trade, health care, and defense. There are six military bases in and around the District. The population density varies considerably by county. The Latino population is spread throughout the District, but it is not evenly distributed. Latinos represent a majority in 60% of the counties (or portions thereof) included in the District.

B. Congressman Bonilla Is The Congressional Candidate Of Choice For Many Latinos

Despite the economic, cultural, and political realities of District 23, Appellants posit the existence of a monolithic bloc of Latinos who oppose Congressman Bonilla; that adoption of the Texas legislative plan halted the political momentum of Latinos "on the brink of electing their candidate of choice," as shown by the results of the 2002 congressional elections; and that there is today only an "impression" of Latino support in District 23 for Congressman Bonilla. Brief for Appellants GI Forum, et al. ("App. Br.") at 3, 10. Appellants' description of such a "Latino bloc" simply does not tell the whole story.

First, Appellants' assertion that Congressman Bonilla was "never the candidate of choice of Latino voters" (App. Br. at 7) confuses the theoretical inquiry into whether a minority group is sufficiently large, cohesive, and geographically compact to elect their "candidate of choice" under this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), with the historical reality that Congressman Bonilla has been the candidate of choice for a great number of Latinos across District 23 since 1992. Applying the *Gingles* factors to a claim that a particular redistricting plan unlawfully dilutes minority votes requires the challenger to identify, for analytical purposes, the putative "candidate of choice" of the minority group. A minority group in turn can satisfy the *Gingles* requirements by showing that it is sufficiently cohesive and geographically compact to function

as an effective voting majority supporting that candidate. J.S. App. at 101–03 (summarizing the *Gingles* factors).

To designate an individual as that candidate (or, here, as the *opponent* of that candidate) is far different, however, from demonstrating *as a matter of historical fact* that the candidate was or was not the candidate of choice for minority voters. It is in this latter regard that the district court in this case concluded that District 23 "had not performed consistently as a Hispanic opportunity district." J.S. App. at 127. Simply put, District 23 had not consistently performed for *Gingles* purposes because the designated "candidates of choice" (Congressman Bonilla's opponents) were not in fact chosen by a sufficient number of Latinos; instead, a significant number of Latinos chose Congressman Bonilla. They chose him for a variety of highly personal reasons: Many chose Congressman Bonilla because of his work on Latino issues; others chose Congressman Bonilla because his life story is the story of countless Latinos throughout the District; and still others chose him because they too are Republicans. As Appellants themselves concede, "the willingness of Latino voters to vote for Mr. Bonilla allowed him to remain in office as his district grew into one with a majority of Spanish-surnamed registered voters." App. Br. at 7.

The reality obscured by Appellants' confusion is that Congressman Bonilla has achieved consistent electoral success over the years only by working to win the votes of *all* of the District's citizens, whether Democratic or Republican, Anglo or Latino. As a political rookie in 1992, he overcame long odds against a well-financed, four-term Democratic incumbent to become the first Latino Republican Representative from Texas, garnering 59% of votes in the heavily Latino district.[8] In the four succeeding elections, he garnered 63%, 62%, 64%, and 59% of votes,

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[8] Barone at 1645.

respectively.[9] In those elections, conducted under a "Democratic Party gerrymander" that the district court noted has been "cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other" (J.S. App. at 21), Congressman Bonilla was the candidate of choice for a great number of Latinos across District 23.[10] He was able to gain the support of those voters only through diligent constituent service and the effective representation of those voters' interests in Congress, and that scenario is perfectly consistent with the goals of the Voting Rights Act.

Second, Appellants' assertion that the results of the 2002 congressional elections demonstrated an inexorable "shift" of Latino voters away from Congressman Bonilla (App. Br. at 9) reads too much into raw election results and fails to account for a unique confluence of factors bearing little relation to racial preferences.

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[9] Barone at 1645.

[10] Congressman Bonilla's work on behalf of the Latino community has earned him widespread recognition from leaders and organizations representing that community. In addition to the numerous awards and recognition he has received from Latino organizations, Congressman Bonilla also has earned the support of individual leaders in the Latino community. In the 2002 election, the nonprofit, nonpartisan Latino Coalition endorsed Congressman Bonilla, as did three former national presidents of the League of United Latin American Citizens (LULAC)—an appellant in these consolidated cases. *See* Javier Barosso, *Attorney Brothers Endorse Bonilla*, Laredo Morning Times, Aug. 24, 2002, at 3A.

Even the American GI Forum, the national parent of Appellant GI Forum of Texas, has previously noted its appreciation for Congressman Bonilla's support for Latino veterans. In a 2002 letter to Congressman Bonilla, then-National Commander Juan R. Mireles cited Congressman Bonilla's "pivotal role" in securing GI Forum's federal charter, his "great sensitivity to the special issues" affecting Hispanic veterans, and the "excellent working relationship" between Congressman Bonilla's office and GI Forum. Letter from Juan R. Mireles, National Commander, American GI Forum of the United States, to the Hon. Henry Bonilla, Member, United States House of Representatives (Sept. 24, 2002). Commander Mireles also thanked Congressman Bonilla for "being a voice and effective advocate" for Hispanic veterans. *Id.*

There is no dispute that the 2002 election resulted in the closest margin of victory for Congressman Bonilla.[11] Rather than a demonstration of hardened Latino opposition to him, however, the results reflect the unusual circumstances of that election. Chief among these was the presence of *two* strong, well-funded candidates from Webb County (where Laredo is located) on the Democratic ticket—former State Representative Henry Cuellar for U.S. Congress and businessman Tony Sanchez, whose ancestors founded Laredo, for Texas Governor.[12] As *The Almanac of American Politics* reports, "[w]hen local businessman Tony Sanchez was the Democratic candidate for governor in 2002, turnout in Webb County surged ... and the outpouring of Democratic votes almost enabled an upset of 23d District Republican Henry Bonilla."[13] Helped by this strong local enthusiasm for Sanchez, Cuellar overwhelmingly carried Webb County, where 38,644 voters cast ballots in the congressional race—an extraordinary 145% jump from the 15,788 who had voted in the 1998 race, when there was neither a presidential race nor a popular local figure running for governor.[14] Cuellar's margin in Webb County was 84% to 15%—over 26,000 votes.[15]

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[11] Appellants err in reporting Congressman Bonilla's 2002 margin of victory as "less than 2 percentage points." App. Br. at 9. Although Congressman Bonilla received under 52% of the vote, his opponent, Henry Cuellar, received approximately 47%. Election History, *at* http://elections.sos.state.tx.us/elchrist.exe. Congressman Bonilla's margin of victory accordingly was over 4%—close but not quite the sliver Appellants report.

[12] *See* Amy Smith, *Looking for Tony*, The Austin Chronicle, Dec. 8, 2000, *available at* http://www.austinchronicle.com/issues/dispatch/2000-12-08/pols_feature.html (last visited Jan. 28, 2006).

[13] Barone at 1659.

[14] Election History, *at* http://elections.sos.state.tx.us/elchrist.exe.

[15] Barone at 1647. In addition to this dynamic, Cuellar may have had crossover appeal to Republicans because he had served in the Republican administration of Governor Rick Perry.

A close examination of the circumstances in District 23 in 2002 accordingly shows nothing more than the affinity of a great number of Latino voters in the District for certain popular local candidates. Indeed, Congressman Bonilla's victory by over 4% in those circumstances indicates the durable support from Latinos he enjoys throughout the District. That Congressman Bonilla substantially outperformed other Republican candidates in Webb County demonstrates his crossover support.[16]

Third, Appellants' suggestion that District 23 under the Texas legislative plan only "create[s] the impression of Latino support" for Congressman Bonilla (App. Br. at 10–12) ignores recent election results demonstrating strong support for Congressman Bonilla among Latinos. In 2004, Congressman Bonilla won reelection with 69% of the vote. While that result was consistent with the Legislature's expressed desire to shore up Congressman Bonilla's Republican base and the intended effect of Plan 1374C, it was Congressman Bonilla's strength among Latinos throughout the District that refutes Appellants' claim. There are 25 counties in District 23. Congressman Bonilla lost only two of those counties in 2004: Zavala County and the portion of El Paso County that falls within the District. The Congressman "carried all the other counties, some of them 85% to 95% Hispanic."[17] Importantly, in what *The Almanac of American Politics* deemed a "huge turnaround," *Congressman Bonilla carried the half of Webb County that remained in the District*—mostly so-called

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[16] Even on his opponent's home turf of Webb County, Congressman Bonilla drew 21% more votes than senatorial candidate John Cornyn, 7% more than Attorney General candidate Greg Abbott, and 50% more than gubernatorial candidate Rick Perry—all of whom won election. *See* Election History, *at* http://elections.sos.state.tx.us/elchrist.exe. Appellants selectively refer to Republican Comptroller candidate Carol Keaton Rylander's impressive electoral performance but fail to disclose that she won in a landslide against a weak opponent, thus minimizing the probative value of comparing their vote totals. *See id.*

[17] Barone at 1647.

"stranded" Latinos—by a margin of 58% to 41%.[18] Similarly, he won nearly 60% of the vote in Maverick County, a county that is over 95% Latino and in which Congressman Bonilla had won only 30% in 2002.[19] These results further show that the 2002 election was an aberration and that Congressman Bonilla enjoys widespread support within the Latino community and across both the old (1151C) and new (1374C) District 23.

C. Latinos Continue To Exert Great Influence In Congressional District 23

Despite Appellants' suggestions to the contrary, District 23 has in no way been "dismantled" as a district in which Latino voters play a substantial, if not dispositive, role in the electoral process. Indeed, it would strain credulity to accept Appellants' claim that 359,000 Latinos are "stranded" in District 23 under the Texas legislative plan, when that number accounts for more than half the voting age population and an estimated 46% of the citizen voting age population ("CVAP") of the District. Under the Texas legislative plan, the District remains an influence district "'where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.'" J.S. App. at 107 (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003)); *see also id.* at 130 (noting that the State legislative plan created six "effective Hispanic opportunity districts and one that is a Hispanic influence district"). It is one in which "'candidates elected without decisive minority support [must be] willing to take the minority's interests into account,'" for they are "'not immune from the obligation to pull, haul, and trade to find common political ground.'" *Ashcroft*, 539 U.S. at 482–83 (2003) (citations omitted). There is simply no reason to presume that a Latino incumbent, raised in the barrios of south San Antonio, Texas will be hostile to this community.

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[18] Barone at 1647.

[19] Election History, *at* http://elections.sos.state.tx.us/elchrist.exe.

See 42 U.S.C. § 1973(b) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered ...."); *Gingles*, 478 U.S. at 45 (noting that, in assessing the impact of the contested electoral practice, "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group ... may have probative value") (citing S. Rep. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 ("Senate Report")).

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THERE WAS NO UNLAWFUL DILUTION OF LATINO VOTES UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Consistent with the reality that Latinos continue to participate meaningfully in the political process in District 23, the district court in this case held, based on the totality of the circumstances, that the Texas legislative plan did not unlawfully dilute Latino votes under Section 2 of the Voting Rights Act. J.S. App. at 159, 161. Appellants challenge that ruling on, among other grounds, the assertion that Section 2 and this Court's decision in *Gingles*, 478 U.S. 30, required the preservation of District 23 as a seventh Latino opportunity district in South and West Texas. This Court should reject Appellants' claim and affirm the district court's decision.

A. Appellants' Allegation That The State "Dismantled" District 23 Does Not Establish Dilution Under Section 2

Appellants first claim that the district court erred in finding no violation of Section 2 of the Voting Rights Act because District 23 has been unlawfully "dismantled" as a Latino opportunity district. They further contend that the district court "erroneously accepted" the State's assertion that it "could remedy, under section 2 as well as section 5,

the loss of District 23 as a majority-minority district by creating District 25." App. Br. at 36. Appellants, however, seriously misunderstand the nature of the separate and distinct inquiries under Section 2 and Section 5 of the Voting Rights Act and the district court's ruling in this regard.

First, Appellants' argument that the Voting Rights Act prohibited the State from "dismantling" District 23 as a Latino opportunity district (App. Br. at 27) is based upon the language of a Section 5 "retrogression" challenge. But Section 5 provides no support for Appellants' claim that the Legislature was required to leave the District 23 created by the *Balderas* plan undisturbed.

Section 5 of the Voting Rights Act requires covered jurisdictions to obtain either administrative preclearance from the Attorney General or a judgment from the United States District Court for the District of Columbia that a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c; *see Georgia v. Ashcroft*, 539 U.S. 461, 465–66 (2003). "Retrogression," however, "is not the inquiry in § 2 dilution cases." *Holder v. Hall*, 512 U.S. 874, 884 (1994) (plurality opinion). Under Section 5, "the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change," but "a benchmark does not exist by definition in § 2 dilution cases." *Id.* at 883–84; *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured.") (citation omitted). Appellants accordingly cannot succeed on a Section 2 claim "'merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.'" *Holder*, 512 U.S. at 884 (plurality opinion) (quoting

Senate Report at 68 n.224). Instead, they must satisfy the requirements of *Gingles*, demonstrate vote dilution under the totality of the circumstances, and present "a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Id.* at 880; *see also id.* at 887 ("In order for an electoral system to dilute a minority group's voting power, there must be an alternative system that would provide greater electoral opportunity to minority voters.") (O'Connor, J., concurring in part and concurring in the judgment). As discussed in Section II.B, *infra*, Appellants have failed to do so.

Even under the standards applicable to Section 5, however, the alteration of District 23's border clearly was not retrogressive in the context of the overall plan. As this Court has held, "while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan *as a whole* offset the loss in a particular district." *Ashcroft*, 539 U.S. at 479 (emphasis added). In this regard, "in examining whether the new plan is retrogressive, the inquiry must encompass the entire *statewide* plan as a whole." *Id.* (emphasis added). Here, there is no dispute that the Legislature's adoption of Plan 1374C caused no statewide decrease in the number of effective Latino opportunity districts when compared to the *Balderas* plan. J.S. App. at 130. That fact conclusively disposes of any retrogression challenge to the State's legislative redistricting plan.

Second, Appellants further confuse the State's obligation to ensure non-retrogression under Section 5 with its Section 2 duty not to dilute minority votes by arguing that the State cannot "remedy" its supposed Section 2 violation by creating new Congressional District 25. *See* App. Br. at 36–38 (citing *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) ("*Shaw II*"); *Johnson v. De Grandy*, 512 U.S. 997, 1019 (1994)). The Legislature, however, did not draw the district lines of Plan 1374C for the purpose of remedying

some imagined or implicitly conceded violation of Section 2. The plan was drawn as an incident of its exercise of the constitutional prerogative to apportion congressional seats in Texas in accordance with the data from the most recent census. *See Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001) (recognizing that under Texas Law, the State legislature has the obligation to draw congressional districts). While it is of course true that in drawing lines the State was obligated to conform its districting plan to the requirements of Section 2 of the Voting Rights Act, this obligation does not translate into a requirement that the State retain any pre-existing district boundaries. As the district court correctly noted, "[t]he *Gingles* districts in South and West Texas could be drawn in different ways, within the constraints of geography and population distribution," and the State "retain[ed] broad remedial power to choose where and how to draw remedial districts." J.S. App. at 148–49.

Accordingly, Appellants' insistence that this Court's precedents preclude the State from "trading off" the rights of Latino voters in the "dismantled" District 23 for the rights of Latino voters in newly created District 25 widely misses the mark. Simply put, if the Legislature's chosen plan, viewed on its own merits and not in relation to any previously existing districts, complies with the strictures of Section 2, Appellants' complaint that the Plan separates certain Latino voters who had previously voted in the same district "say[s] only that the lines could have been drawn elsewhere, nothing more." *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994). Neither Section 2 nor this Court's precedents accord a voter the right to be a part of a specific district. *See Shaw II*, 517 U.S. at 917 n.9 (noting that an individual plaintiff does not have the right to be placed in a majority-minority district even where a Section 2 violation has been shown); J.S. App. at 149 ("[T]o say that the State could have retained the lines of Congressional District 23 drawn under Plan 1151C and not created a third district based in the Rio Grande Valley with a majority of Hispanic

citizen voting age population is different from saying that the State was obligated to make that choice.").

Appellants pay lip service to this inescapable reality, "recogniz[ing] that any time redistricting occurs, it is likely that some voters who were originally assigned to a district in which they were able to elect a candidate of their choice will find themselves assigned to a district in which that is no longer true." App. Br. at 37. They suggest, however, that because it is *often* true that this occurs "when the voter is a member of a group whose share of the population is growing and thus lives in a district that will be overpopulated, thus requiring the removal of some voters," a state may permissibly effect such a change *only* when "required by the Constitution's mandate of equal protection." *Id.* at 37–38. Such a rule would cripple the redistricting process—"a most difficult subject for legislatures"—and would be contrary to the decisions of this Court respecting a state's "discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[T]he federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements."). So long as the lines drawn by the State did not violate federal law, federal courts must respect the choices made by the Texas Legislature.

Appellants' reliance on this Court's decisions in *Shaw II* and *De Grandy* is misplaced, because both decisions involved acknowledged or assumed Section 2 violations. In *Shaw II*, this Court rejected the proposition that "once a legislature has a strong basis in evidence for concluding that a § 2 violation *exists* in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with the compact *Gingles* district, as long as racially polarized voting exists where the district is ultimately drawn." *Shaw II*, 517 U.S. at 916-17 (emphasis added). This Court held that a Section 2 violation in a particular area satisfying *Gingles*'s requirements could not be remedied by creating a majority-minority district

somewhere else. *Id.* at 917. Similarly, in *De Grandy*, this Court rejected the State's argument that regardless whether the *Gingles* preconditions were satisfied, a Plan in which a minority group controlled a percentage of districts equal to its percentage in the relevant population was valid under Section 2 as a matter of law. *De Grandy*, 512 U.S. at 1017–18. This Court explained that allowing a State to "fix" voter dilution in a district that violated Section 2 by adding votes in a district that had no connection to the Section 2 problem was no remedy at all. *Id.* at 1019.

Shaw II and *De Grandy* stand for the unremarkable proposition that dilution of minority votes within a given area cannot be remedied by creating majority-minority districts *outside* of the relevant area. In this case, for instance, if application of Section 2 standards demonstrated that six Latino majority districts should be drawn in South and West Texas, the State could not draw five districts in that area and one in North Texas. But this Court's precedents certainly do not stand for the proposition that shifting district lines within the relevant area while still maintaining the number of majority-minority districts mandated by Section 2 is *itself* a violation of Section 2. As the district court correctly noted, "*Shaw II* does not preclude the State from choosing where and how to draw majority-minority districts in areas where *Gingles* is satisfied." J.S. App. at 149. States retain great flexibility to draw the appropriate number of *Gingles* districts so long as they do not subordinate traditional districting considerations to racial ones.[20] *Bush v. Vera*, 517 U.S. 952,

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[20] Appellants appear to suggest that because the State was compelled to reach farther north in order to draw the necessary *Gingles* districts, the Plan is invalid. But this would be true only if Appellants were able to show that in drawing these districts, the State subordinated traditional redistricting criteria of compactness and respect for communities of interest and political divisions to racial considerations. *See Shaw II*, 517 U.S. at 935-37. The District Court, however, made comprehensive findings, supported by the extensive factual record, demonstrating just the opposite. *See* J.S. App. at 162–179.

978 (1996) ("[T]he States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability."). Appellants' argument that the shift in District 23's boundaries violated Section 2 by "trading off" Latino voters in District 23 against Latino voters in District 25 simply attacks a "remedy" as insufficient without first demonstrating that there was a wrong. And, as discussed below, the district court correctly determined that Appellants failed to prove dilution under Section 2.

B. Appellants Failed To Demonstrate Unlawful Dilution Of Latino Votes Under The Totality Of The Circumstances

In evaluating Appellants' Section 2 dilution challenge, the district court was required to determine "based 'upon a searching practical evaluation of the "past and present reality,"' [Senate Report] at 30 (footnote omitted), whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79 (citation omitted). This determination "requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms," and is "'peculiarly dependent upon the facts of each case.'" *Id.* (quoting *Rogers v. Lodge*, 458 U.S. 613, 621–22 (1982)). Accordingly, the district court's findings are not to be set aside unless clearly erroneous. *See, e.g., id.*; *City of Rome v. United States*, 446 U.S. 156, 183 (1980).[21] The district court's rejection of Appellants' demonstration plan, and its finding that Appellants failed to demonstrate unlawful

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[21] "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 287 (1982).

dilution of Latino votes under the totality of the circumstances, were consistent with this Court's precedents, find ample support in the record, and should not be disturbed.

First, in order to prevail on their Section 2 claim, Appellants were required to offer "a reasonable alternative practice as a benchmark against which to measure the existing voting practice" that satisfies the so-called *Gingles* requirements and demonstrates, under the totality of the circumstances, that the challenged electoral regime unlawfully dilutes minority voting strength. *Holder*, 512 U.S. at 880 (plurality opinion); *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).[22] Appellants were required to "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice" because "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Bossier Parish Sch. Bd.*, 520 U.S. at 480. As Justice O'Connor explained in *Gingles*, "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." 478 U.S. at 88 (O'Connor, J., concurring in judgment). Appellants submit that the "'norm with respect to which the fact of dilution may be ascertained,'" *id.* (O'Connor, J., concurring in judgment) (citation omitted), reasonably should be a demonstration plan in which Latinos constituting 58% of the citizen voting age population of South and West Texas are able to elect their preferred

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[22] This Court in *Gingles* held that a plaintiff raising a Section 2 dilution claim must establish, at a minimum: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the group "is politically cohesive"; and (3) that "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." 478 U.S. at 50–51.

candidates in seven of the seven congressional districts in that area.

The district court correctly rejected this claim as grounded in a proposition this Court flatly rejected in *De Grandy*: that a "failure to maximize" the number of majority-minority districts is the proper measure of vote dilution under Section 2 of the Voting Rights Act. 512 U.S. at 1016–17; *see also id.* at 1026 ("[T]he District Court's maximization theory was an erroneous application of § 2.") (Kennedy, J., concurring in part and in the judgment). In *De Grandy*, this Court reversed a district court's finding that the state's redistricting plan unlawfully diluted minority votes by not creating the maximum number of majority-minority districts meeting the three *Gingles* factors, despite uncontroverted proof that the number of majority-minority districts created by the State's plan was roughly proportional to the minority voters' respective shares of the voting age population. *Id.* at 1022. This Court explained that the three *Gingles* factors, while clearly necessary to proving dilution under Voting Rights Act Section 2, are not "sufficient in combination, either in the sense that a court's examination of relevant circumstances was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Id.* at 1011. Instead, the correct inquiry is "whether the totality of facts, including those pointing to proportionality," which "links the number of majority-minority voting districts to the minority members' share of the *relevant population*," show that the challenged redistricting plan "would deny minority voters equal political opportunity." *Id.* at 1013–14 & n.11 (emphasis added). In this regard, this Court observed that, "[t]reating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity." *Id.* at 1014.

Appellants point to no facts that could serve to justify this type of race-maximizing "benchmark" or "norm" in the

districts at issue here. As in *De Grandy*, it would be "absurd" to suggest that a minority group constituting 58% of the population in South and West Texas is denied equal participation in the political process unless, consistent with the designs of Appellants' demonstration plan, it is able to control 100% of the political process. *Id.*[23] Such a maximization theory, this Court has admonished, "causes its own dangers, and they are not to be courted." *Id.* at 1016. It "tends to obscure the very object of the statute and to run counter to its textually stated purpose." *Id.* at 1016–17. Appellants' demonstration plan, seeking to guarantee Latino hegemony in South and West Texas, manifestly was not a "reasonable alternative" against which to measure the Texas legislative plan. *Holder*, 512 U.S. at 880. While "[o]ne may suspect vote dilution from political famine," Appellants "[are] not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." *De Grandy*, 512 U.S. at 1017.

Implicitly recognizing that *De Grandy* forecloses the use of their plan as the measure for dilution unless the district court used the wrong standard for assessing proportionality,

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[23] Indeed, the facts of this case closely parallel those of *De Grandy*. In both cases, plaintiffs claimed a Section 2 violation based on alleged voter dilution in a specific region of the state—Dade County in *De Grandy* and South and West Texas in this case. *See* 512 U.S. at 1006; J.S. App. at 123. The plaintiffs in both cases offered alternative plans that proposed the creation of more districts in that particular region than the state's plan. *See De Grandy*, 512 U.S. at 1002–03 (proposing the creation of eleven Hispanic opportunity districts instead of nine); J.S. App. at 133 (proposing the creation of seven Hispanic opportunity districts instead of six). In both cases, however, the data presented pertained only to the percentage and relative voting strength of minorities in the challenged region and not the whole state. *See De Grandy*, 512 U.S. at 1022 ("The complaint alleges no facts at all about the contours, demographics, or voting patterns of any districts outside the Dade County or Escambia County areas ...."); J.S. App. at 138-39. Finally, in both cases, the challenged plan contained a percentage share of legislative districts in the relevant region at least roughly proportional to the minority groups' percentage of the relevant population. *See De Grandy*, 512 U.S. at 1014; J.S. App. at 139.

Appellants contend that their proposed creation of seven majority-minority districts is in proportion to the Latino citizen voting age population when assessed on a statewide basis. App. Br. at 46–49. "The first *Gingles* precondition," Appellants argue, "addresses whether minority voters are geographically concentrated in such a way that the proposed remedy will address their vote dilution; proportionality addresses a very different issue—whether minorities enjoy political opportunity regardless of geographical dispersion." *Id.* at 48. Because Latinos comprise approximately 24.5% of the *entire state's* citizen voting age population, Appellants contend that "proportionality would be met at 7.83 districts." *Id.* at 48–49.

Appellants' arguments make little sense. Although *De Grandy* presented "no occasion to decide which frame of reference should [be] used ... on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy," 512 U.S. at 1022, this Court's teachings in *Gingles* provide the controlling principle. *Gingles*, 478 U.S. at 49-51. This Court explained in *Gingles* that only by demonstrating a sufficiently large and cohesive concentration of minority voters within a geographically compact area can minority voters in that area attribute an inability to elect their candidates of choice to a particular electoral practice. *Id.* at 50–51. Absent such a showing, factors such as geographic dispersion, a lack of common interests, or low numbers—not the state's redistricting choices—account for the group's lack of electoral success. *Id.* at 50–51 & n.17 ("Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.").

Contrary to Appellants' arguments, minority group cohesion and concentration are not issues "very different" (App. Br. at 48) from *De Grandy* proportionality. The *De Grandy* proportionality inquiry simply applies the *Gingles* inquiry across multiple districts, asking whether the state has drawn district lines in a way that reflects the relative

political strength of minority voters in the relevant area. *See De Grandy*, 512 U.S. at 1011–13. It does not, however, allow minority groups to compensate for a lack of cohesion or wide geographical dispersion outside the relevant area by requiring the state to artificially bolster their electoral potency—in this case, "to provide a minority group with effective political power [72] percent above its numerical strength." *Id.* at 1017.[24] *De Grandy* does not purport to create "politically cohesive, geographically insular minority group[s]" where they do not exist. *Gingles*, 478 U.S. at 49.[25]

These principles compel the conclusion that the district court did not err by rejecting Appellants' demonstration plan and holding that "[t]he totality of facts and circumstances, including those pointing to proportionality, ... does not show a violation of § 2 in South and West Texas under Plan 1374C." J.S. App. at 161. As in *De Grandy*, the totality of the circumstances in this case does not support a finding of vote dilution, where Latinos constitute 58% of the citizen voting age population of South and West Texas; they effectively control six of seven (86%) districts; they wield considerable influence in the seventh district, District 23; and Appellants have not "produced evidence otherwise indicating that [Latino voters] have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their

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[24] A minority group constituting 58% of the population can be said to enjoy "effective political power" 72% above its numerical strength by controlling 7 of 7 districts. *De Grandy*, 512 U.S. at 1017 n.13.

[25] Indeed, even Appellants' demonstration plan cannot meet Appellants' proposed proportionality inquiry. Appellants argue that the district court should have concluded that *eight* Latino opportunity districts were required in order to satisfy their proportionality standard. App. Br. at 48–49. The demonstration plan, however, contemplates only *seven* Latino opportunity districts. No party argues that eight such districts can be created in South and West Texas, or that an eighth district can be created elsewhere in the state consistent with *Gingles*. Appellants clearly prove too much in trying to unmoor *De Grandy* proportionality from the *Gingles* compactness and cohesion inquiries.

choice.'" 512 U.S. at 1024 (quoting 42 U.S.C. § 1973(b)). Indeed, District 23 has consistently elected a Latino candidate, returning Congressman Bonilla to the House in six straight elections. *See Gingles*, 478 U.S. at 75-77 (citing Senate Report at 29) (finding that "sustained" electoral success by a minority candidate is inconsistent with a § 2 violation).[26]

Second, even if a demonstration plan pursuing a discredited maximization goal could nevertheless serve as "a reasonable alternative practice ... against which to measure the existing voting practice," *Holder*, 512 U.S. at 880 (plurality opinion), the district court still properly rejected a claim of dilution on the record here. Appellants failed to establish that the plan adopted by the State would dilute the "'political effectiveness'" that Latinos would realistically achieve in the districts proposed by Appellants. *Bossier Parish Sch. Bd.*, 520 U.S. at 479 (quoting Senate Report at 28). As the district court found, Appellants' plan did not create a greater number of *effective* Latino opportunity districts in South and West Texas than the plan adopted by the Legislature.

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[26] Appellants' suggestion that Congressman Bonilla's race is irrelevant to the question whether Latinos have less opportunity than other members of the electorate to participate in the political process (App. Br. at 34–35) is directly contradicted by the statute and the accompanying Senate Report (*see* 42 U.S.C. § 1973(b); Senate Report at 29) and is based on an incorrect reading of the section of the plurality opinion in *Gingles* in which Justice Brennan discounted the relevance of the candidate's race to the discrete inquiry into whether the plaintiffs had demonstrated *racially polarized voting*. 478 U.S. at 67–68. That issue, of course, does not conclusively answer the question whether, under the totality of the circumstances, Latinos are able to participate effectively in the political process. In any event, the plurality's resolution of that issue did not command a majority of this Court. *See Gingles*, 478 U.S. at 82–83 (White, J., with O'Connor and Stevens, JJ., concurring); *Baird v. Indianapolis*, 976 F.2d 357, 362 (7th Cir. 1992) (recognizing that only three Justices agreed that the "race of the persons elected" was irrelevant to a § 2 claim).

The district court in this case was not the first to reject a claim that Section 2 requires the creation of a seventh Latino opportunity district in South Texas. In designing Plan 1151C—the predecessor to the Texas legislative plan—the *Balderas* court expressly rejected such a proposal, finding that the "Latino population is not sufficiently compact or numerous to support another, *effective* majority Latino citizenship district in Texas, in Dallas County or in South Texas." *Balderas v. Texas*, No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740, at *26–27 (E.D. Tex. Nov. 14, 2001) (emphasis added). The court accordingly found that, "under the totality of the circumstances, the failure to create seven such districts [would] not prevent full and equal Latino participation in the political process." *Id.* at *27. This Court summarily affirmed those findings. *Balderas v. Texas*, 536 U.S. 919 (2002).

Following *Balderas*'s lead, the district court concluded that, even though Appellants' demonstration plan would create seven districts each containing a majority Latino CVAP of at least 50%, the record evidence established that Latinos would not be likely to elect candidates of their choice in all seven districts. As the court noted, even Appellants' witnesses testified at trial that "a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district." J.S. App. at 141 & n.134 (citing testimony of Dr. Jerry Polinard, Dr. Allan J. Lichtman, and Congressmen Charlie Gonzalez and Ruben Hinojosa). Dr. Polinard testified on behalf of Appellants, for instance, that because of voting behavior, "you become comfortable with opportunity districts once you break into those 60%-plus ranges." *Id.* at 141 n.134 (quoting Tr. File 8 at 50–51). The court accordingly was not persuaded that the demonstration plan's proposed 50.3% Latino CVAP majority in District 28, as well as the Latino CVAP majorities of less than 60% in five of the seven districts, would consistently result in the election of Latino candidates of choice. J.S. App. at 140-41. That factual finding is fully supported by the record. *See De Grandy*, 512

U.S. at 1011 ("[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.").[27]

The district court correctly rejected Appellants' complaint (*see* App. Br. at 43) that, having maximized the number of districts containing majority Latino citizen voting age populations in their demonstration plan, it should not matter whether all of those districts would actually function as *effective* Latino opportunity districts. J.S. App. at 143. Even if Appellants' plan would satisfy the *Gingles* inquiry by including more districts with bare majorities, it would not establish unlawful dilution on this record.[28] While the *Gingles* factors assist in determining whether "the minority

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[27] Appellants complain that, having cited the testimony and studies of their witnesses to support its conclusion that the legislative plan contained six effective Latino opportunity districts, the district court should also have viewed that evidence as offering a dispositive answer to the question whether their demonstration districts were effective Latino opportunity districts. App. Br. at 45–46 ("Although the District Court relied upon and reprinted in its opinion the GI Forum's statistical table showing six Latino opportunity districts in the State Plan the District Court excised the portion of that same table showing seven Latino opportunity districts in the GI Forum plan."). The district court, however, acted perfectly within the bounds of its discretion in declining to adopt the conclusions of Appellants' witnesses as to the demonstration plan, in light of other evidence and testimony tending to show that the plan would have spread the Latino population in South and West Texas too thinly across seven districts. That the district court, like the *Balderas* panel before it, decided to draw the discretionary line between six and seven Latino opportunity districts after considering the totality of the circumstances cannot be said to have been clearly erroneous.

[28] There is substantial reason to believe that bare majorities are not sufficient under *Gingles*. This Court has described the test as asking whether there are "effective voting majorities" in the relevant area. *De Grandy*, 512 U.S. at 1000; *id.* at 1017 ("districts in which minority voters form an effective majority"); *id.* at 1024 ("effective majority"); *see also id.* at 1008 (explaining that *Gingles* "requires the possibility of creating more than the existing number of reasonably compact districts with a *sufficiently large* minority population to elect candidates of its choice") (emphasis added).

has the potential to elect a representative of its own choice in some single-member district," *Growe v. Emison*, 507 U.S. 25, 40 (1993), this Court has squarely held that they do not establish a Section 2 dilution claim. *See De Grandy*, 512 U.S. at 1011; *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) ("[T]he *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.").

Appellants could not prove that the State has unlawfully impaired the "'political effectiveness'" of Latinos by failing to adopt a demonstration plan that created the same number or fewer effective Latino opportunity districts than the challenged plan. *Bossier Parish Sch. Bd.*, 520 U.S. at 479 (quoting Senate Report at 28). As the district court found, the Legislature's plan and the demonstration plan included the same number of districts in which Latinos constituted at least 55% of the citizen voting age population, and the Legislature's plan included one more district with a Latino CVAP of over 60%. J.S. App. at 142–43. The court, moreover, found that the legislative plan created "seven congressional districts in South and West Texas, six with a majority of Latino citizen voting age population that are ... effective Hispanic opportunity districts, and one [District 23] that is a Hispanic influence district." *Id.* at 130; *see also id.* at 107 ("[I]nfluence districts are voting districts 'where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.'") (quoting *Ashcroft*, 539 U.S. at 482).[29] In

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[29] There is no reason to reject the district court's conclusion that, under the totality of the circumstances, the legislative plan contains six effective Latino opportunity districts. The district court in this regard undertook an exhaustive review of population data, regression analyses, and the testimony of experts and witnesses knowledgeable about on-the-ground politics in South and West Texas. J.S. App. at 143–62. Appellants' own expert, Dr. Richard Engstrom, testified at trial that each of the six districts with a majority Latino citizen voting age population provided Latinos with the opportunity to elect their preferred candidate of choice. Joint Appendix ("J.A.") at 251 (Tr., Dec. 16, 2003, 8:30 a.m., at 53–54). Appellants' regression analysis also concluded that Latinos

light of the district court's finding that "a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district" (J.S. App. at 141), there is no basis to conclude that the Texas legislative plan will "'minimize or cancel out the voting strength and political effectiveness of minority groups'" when compared to Appellants' demonstration plan. *Bossier Parish Sch. Bd.*, 520 U.S. at 479 (quoting Senate Report at 28).

CONCLUSION

For the foregoing reasons, *amicus curiae* Congressman Henry Bonilla respectfully requests this Court to affirm the decision of the United States District Court for the Eastern District of Texas.

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elected their candidate of choice in eight out of eight racially contested elections between 1994 and 2002 in every one of the Latino majority citizen voting age population districts under the Legislative Plan. J.S. App. at 151–52. Finally, Dr. Engstrom testified at trial that the margin of victory for the Latino-preferred candidate in demonstration plan District 25 is lower that the margin of victory in legislative plan District 25. J.A. at 253–54 (Tr., Dec. 16, 2003, 8:30 a.m., at 56–57). In light of such overwhelming record evidence, the district court's finding that the legislative plan's contained six effective Latino opportunity districts was not clearly erroneous.

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Nos. 05-204, 05-254, 05-276, 05-439

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IN THE SUPREME COURT OF THE UNITED STATES

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees

TRAVIS COUNTY, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

EDDIE JACKSON, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

GI FORUM OF TEXAS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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INTERESTS OF THE *AMICUS CURIAE*

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. Through the Voting and Representation Project, which is part of our Democracy Program, the Brennan Center seeks to protect the right to equal electoral access and full political participation. The Brennan Center takes an interest in this case because it implicates voters' ability to have a meaningful voice in their government in light of increasingly sophisticated gerrymandering techniques, and because it presents the specter of an escalating war of mid-decade "re-redistrictings" that will further undermine the responsiveness of representatives to those whom they purport to represent. The Brennan Center submitted briefs on related issues in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), as well as a brief supporting an application for a stay the first time the current cases were appealed to this Court.[1]

SUMMARY OF ARGUMENT

Simply put, this case arises out of perhaps the most notorious, even scandalous, partisan gerrymanders of the past half century. This redistricting had no purpose other than partisan gerrymandering. No one even pretends to assert that it had any other purpose. It was pushed through the state legislature on entirely partisan grounds just two years after the last, constitutionally required reapportionment. This mid-decade

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[1] No party's counsel authored any part of this brief. No person or entity other than *amicus* and counsel contributed monetarily to preparing or submitting the brief. Letters from all parties' counsel consenting to the filing of this brief have been lodged herewith.

re-redistricting fails constitutional muster. If it does not fail, it is hard to imagine what would.

It fails even after the decision in *Vieth*. If the *Vieth* plurality and dissenters agreed on nothing else, they agreed on what the case was about. The author of the plurality opinion noted that eight of the nine Justices agreed that politics is a constitutional redistricting criterion "so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting). The *Vieth* dissenters did not disagree; after all, two of them had opined that while *some* intent to gain political advantage was inevitable, "the issue is one of how much is too much." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting).

How far is too far? How much is too much? Whatever the range of possible answers is, it is plain that 110% must be too much. That is the weight that one of the re-redistricting's architects assigned to political gain for Republicans when asked about the legislature's motives. *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex.) (noting that "political gain for Republicans was 110% of the motivation for the Plan"), *vacated in five separate orders*, 125 Sup. Ct. 351-52 (2004). The state has contended, and the District Court found, that the re-redistricting was undertaken purely for political advantage. This Court need not decide whether 51%, or 75%, or 90% is too much; when the impermissible purpose of harming voters with disfavored viewpoints is not leavened with any legitimate state purpose, the state has violated the Constitution.

In many respects, this case is not a typical redistricting case of the sort considered by this Court several times in recent decades. It arises out of singular – and distinctly distressing – circumstances. Ordinary post-census redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the "one person, one vote" guarantee. The mixture of motives

that attends decennial redistricting—partisanship, incumbent protection, eliminating mal-apportionment, and so on—may seem to complicate the formulation of "judicially manageable standards" for determining whether the resulting map is so badly skewed towards one faction as to violate the Constitution. *See Baker v. Carr*, 369 U.S. 186, 226 (1962). This case, accepting the District Court's findings (and the state's own contentions), involves no such mixed motives. It requires only a narrow, judicially manageable rule: state action that is admittedly and openly taken *solely* for partisan advantage is illegal.

In short, 110% is too much.

ARGUMENT

I.
The Constitution Establishes a Representative Democracy Incompatible with State Action Designed to Disadvantage Citizens with Disfavored Political Opinions.

Representative democracy, protected by federalism and the separation of powers as well as by the Bill of Rights and later amendments, is the essence of the Constitution. Our foundational text, particularly as amended, enshrines two principles: the right of the people to participate as equals in the project of self-governance; and the necessity for representatives to be accountable to their electors. The Texas redistricting clashes with both of these principles.

A. Constitutional Structure.

The Court has attended to the Constitution's structure, as well as the text of specific clauses, in adjudicating the division of power both among the branches, *see, e.g., INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of

the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) ("[T]he literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the . . . structural imperatives of the Constitution as a whole."), and between the federal and state governments, *see, e.g.*, *Alden v. Maine*, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); *Fed. Maritime Comm'n v. S. Car. State Ports Auth.*, 535 U.S. 743, 754 (2002) (applying "the sovereign immunity embedded in our constitutional structure").

The most fundamental division of power in our democracy—between the government as a whole and the people from whom it derives all legitimate authority—similarly suffuses the Constitution. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). The Framers included in the text numerous structural elements to give effect to the popular will. *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 1 (requiring periodic election of House members by "the people"); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

Not only the original Framers, but those who have followed, have focused their attention on preserving democratic self-governance. Of the 17 amendments adopted after the Bill of Rights, 12 deal with the democratic process or the government's accountability to the people. The Fourteenth

Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and conditions states' representation in Congress on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments implement equal universal suffrage by banning voting discrimination on the basis of race, sex, wealth, or youth; provide for direct popular election of Senators; and permit residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments provide for separate elections of the President and Vice-President, limit a lame-duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in time of Presidential disability. The Twenty-Seventh Amendment enforces accountability by forbidding Members of Congress from enjoying self-enacted pay raises without first standing for re-election.

Thus, the Constitution views every American citizen as a member of a self-governing community of political equals. In pursuit of that vision, it guarantees to each citizen the right to participate in democracy through voting, running for office, and fair representation. It also guarantees that the government will remain accountable to the people. It is this normative vision of representative democracy that underlies *Baker* and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). It is this vision that is desecrated when a state openly, admittedly, and intentionally deprives citizens who have expressed disfavored viewpoints from participating as political equals in our representative democracy.

One would think that the principle of state neutrality among citizens of different political persuasions ought to be uncontroversial.

> If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.

Vieth, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The question should therefore be, not whether the Constitution permits a state to do what the Texas legislature set out to do, for surely it does not. The question is whether by acting in accordance with Justice Kennedy's hypothesized enactment but without adopting the enactment itself, a state can get away with its constitutional violation because courts cannot define a judicially enforceable rule giving effect to the Constitution's command. For, as Justice Kennedy went on to point out, pursuing the same outcome by different means does not render the impermissible permissible. At most, it makes the violation irremediable:

> If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive.

Id.[2] While four Justices concluded in *Vieth* that no judicially manageable standard could be crafted in the context of regular decennial redistricting (a conclusion with which we respectfully disagree), that problem does not affect this case, for reasons discussed in Point III below. Whatever the difficulties in other contexts, this particular assault on our constitutional structure can be averted by the judiciary.

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[2] Justice Kennedy's description might be applied to the Democratic gerrymander of Georgia, which was struck down because the party in power did not quite manage to act "still in accord with one-person, one-vote principles." *See Cox*, 542 U.S. 947.